Supreme Court, U.S.
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No. 96-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ILLINOIS,

Petitioner,

v.

RICHARD C. NITZ,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In opposing the petition for certiorari, the Respondent focuses on three major points: (1) that the majority of the Illinois Supreme Court found a violation of the Due Process Clause in the case below because the State failed to disclose to defense counsel, the trial judge and Respondent himself that he was being administered psychotropic medication during his trial and sentencing hearing (Opposition, pp. 4-5); (2) that Respondent did not voluntarily take the psychotropic drugs but, instead, was somehow "secret[ly] drugged" (Opposition, p. 5); and (3) that the decision below has no impact beyond Respondent's own case (Opposition, pp. 8-10). The Petitioner will address each point in the above sequence.

I.

THE MAJORITY'S HOLDING WAS BASED ON A PERCEIVED DENIAL OF RESPONDENT'S DUE PROCESS RIGHT TO INQUIRY INTO HIS FITNESS TO STAND TRIAL, NOT ON THE STATE'S ALLEGED FAILURE TO DISCLOSE THAT RESPONDENT WAS RECEIVING PSYCHOTROPIC DRUGS.

Respondent Nitz did in fact contend in the post-conviction court and the Illinois Supreme Court that, under *Brady v. Maryland*, 373 U.S. 83 (1963), he was entitled to a new trial because the State failed to inform his counsel that he was receiving a psychotropic drug throughout trial and sentencing. But as the majority of the Illinois Supreme Court clearly stated in its opinion, "[g]iven our determination that defendant is entitled to a new trial based upon a violation of his right to an inquiry on the issue of his fitness, we do not address defendant's *Brady* claim." (App. to Petition, p. 14). Even a superficial reading of the majority's opinion bears out the fact that it based its holding on a perceived denial of Respondent's due process right to inquiry into his fitness to stand trial. The majority stated:

> Here, the relevant statutory procedure provides for a fitness hearing. Although defendant's right to that particular procedure is wholly statutory, his right to inquiry concerning fitness flows from the due process guarantee.
>
> * * *
>
> Here, as in *Pate*, because no procedure was invoked, defendant was denied inquiry into the issue of his fitness. Due process was thereby denied.

(App. to Petition, p. 9).

Respondent's contention that the majority's finding of a violation of the Due Process Clause was based on the State's failure to disclose that he was on psychotropic medication is belied by the majority's holdings in other decisions in this line of cases. Never has the majority indicated that its holding was based on any kind of duty on the part of the prosecution to disclose to defense counsel or the trial judge that the defendant was being given psychotropic medication. Instead, the majority stated in *People v. Kinkead*, 168 Ill. 2d 394, 660 N.E.2d 852 (1995), that its decisions in *People v. Brandon*, 162 Ill. 2d 450, 643 N.E.2d 712 (1994) and *People v. Gevas*, 166 Ill. 2d 461, 655 N.E.2d 894 (1995), "were premised on the General Assembly's recognition that 'psychotropic medication is an important signal that a defendant may not be competent to stand trial.'"[1] 168 Ill. 2d

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[1] Each of these cases involved a different set of circumstances with respect to any knowledge on the part of the parties or the trial judge concerning the defendant's taking of the drugs. In *Gevas*, several months after the defendant pleaded guilty and was sentenced to death, defense counsel became aware through a letter from a psychiatrist that the defendant had been on psychotropic drugs during the proceedings. Counsel at that time asked for a fitness hearing which was denied by the trial judge. His conviction and sentence were reversed. 166 Ill. 2d at 468-69, 655 N.E.2d at 896-97. In *Kinkead*, a presentence report entered into

(continued...)

at 408, 660 N.E.2d at 858. And in *People v. Birdsall*, 172 Ill. 2d 464, 670 N.E.2d 700 (1996),[2] the majority, citing *Kinkead*, *Gevas*, *Brandon*, and *Drope v. Missouri*, 420 U.S. 162 (1975), elaborated on the holdings in its previous cases, concluding that:

> Consistent with principles of due process, if an accused who is entitled to a fitness hearing [under § 104-21(a)] is not accorded such hearing before being criminally prosecuted or sentenced, the conviction ordinarily must be reversed and the cause remanded for further proceedings.

172 Ill. 2d at 476, 670 N.E.2d at 706.

The State of Illinois would also point out that if there is any doubt that the rule applied by the majority in this line

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[1] (...continued)
evidence at the second stage of defendant's death penalty hearing indicated that he was receiving drugs, including Thorazine, for his depression. Counsel did not ask for a fitness hearing and the court did not order one *sua sponte*. 172 Ill.2d at 406, 660 N.E.2d at 855-56. The case was remanded to determine whether the drug was given proximate enough in time to the defendant's guilty plea to find that defense counsel's failure to request a fitness hearing and the court's failure to hold such hearing "had in fact denied defendant due process of law." *Id.* at 414, 861. In *Brandon*, defense counsel twice asked for a fitness hearing based on their perception that the defendant did not understand the discussions they had with him about the case. The trial court denied both hearing requests. The majority of the Illinois Supreme Court held that even though counsel had asked for a fitness hearing, they did not render effective assistance of counsel under the Sixth Amendment due to their failure to advise the court that the defendant was taking psychotropic drugs. 162 Ill. 2d at 454-55; 457, 643 N.E.2d at 714-15.

[2] In *Birdsall*, a presentence report prepared after the defendant was found guilty and eligible for the death penalty revealed that, at the time of the report, defendant was taking Thorazine for depression. 172 Ill. 2d at 471, 670 N.E.2d at 704. Again, counsel did not ask for a hearing and the court did not order one. Defendant's conviction and sentence were reversed.

of cases is anything but an "automatic reversal" rule, one need only look to the opinion below where the majority states:

> "[a]utomatic reversal" for the failure to have a fitness hearing is not a new concept in Illinois. Even before *Brandon* and its progeny, where a requisite fitness hearing was not provided, reversal was deemed the appropriate remedy.

(App. to Petition at p. 13).

Respondent does in fact concede in a footnote in his brief in opposition that the majority of the Illinois Supreme Court never reached his *Brady* claim. He argues, however, that the petition for certiorari should be denied because "the *Brady* violation presents a valid alternative holding for the Illinois Court's grant of new trial." (Opposition, p. 7 n. 6). The State of Illinois contends that Respondent is unable to prove a *Brady* violation and, accordingly, there is no valid alternative holding for the grant of a new trial.

A successful *Brady* claim requires three elements: (1) the prosecution suppressed evidence; (2) the evidence suppressed was favorable to the defense or exculpatory; and (3) the evidence suppressed was material to the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Respondent cannot meet these requirements.

First, the fact that Nitz was taking Tranxene was not material to the issue of his guilt or punishment. Moreover, he cannot establish that the fact was suppressed by the prosecution. As was stated in the petition for certiorari, there is no indication that the prosecutors were informed that Nitz was taking the medication, especially since his fitness to stand trial was not at issue. Under Illinois law, the knowledge of every governmental employee involved in a criminal case will not automatically be imputed to the prosecution team, and, perhaps the most significant point for

the court to consider is whether the alleged failure to transmit the information to the prosecution was intentional. *People v. Robinson*, 157 Ill. 2d 68, 80, 623 N.E.2d 352, 358 (1993).[3] Generally, members of the prosecution team are not informed when a defendant has been prescribed any type of medication by county health authorities. Such information usually comes out for the first time in a presentence report or if the defendant is examined by a mental health expert who issues a report to the court. Finally, it cannot be overlooked that Respondent had to have known he was being given some kind of medication, although he now claims that he was being "secretly drugged," in that jail records indicate that he refused the Tranxene on six separate occasions. In sum, there is no suppression, and thus no *Brady* violation, if the defendant knows before trial of the allegedly exculpatory information. *Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1996). Accordingly, *Brady* would not provide a valid alternative holding for the grant of a new trial in this case.

II.

RESPONDENT NITZ WAS NOT FORCIBLY ADMINISTERED PSYCHOTROPIC MEDICATION.

In an attempt to convince this Court that his case is similar to *Riggins v. Nevada*, 504 U.S. 127 (1992), wherein it was held that a defendant being forcibly administered psy-

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[3] See also *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996), holding that there is no duty on the part of the prosecution team, even after this Court's decision in *Kyles v. Whitley*, 115 S.Ct. 15555 (1995), to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue. County health authorities and jail personnel would clearly fall under the category of governmental employees who had no involvement in the investigation or prosecution of the case.

chotropic medication for the purpose of rendering him fit to stand trial was denied a fair trial, Respondent now claims that he was somehow "secret[ly] drugged" by the State. (Opposition, p. 5). This, however, is the first time Respondent has made such a claim. In his opening brief in the Illinois Supreme Court, he claimed only that he had "no recollection of being medicated (Richard Nitz Affidavit, Exh. 14 at ¶ 3), and [that] his trial counsel was not aware that [he] was being medicated. (Broeking Deposition, Exh. 11, pp. 95-96.)." (Respondent's Opening Brief at 13). And although now, in connection with his *Brady* claim, he argues that the State failed to disclose to him that he was being given the Tranxene, below he argued only that the State "failed to inform the trial court and defense counsel of the fact that it was administering psychotropic medication to [him]." (Respondent's Reply Brief at 3; *see also* Reply Brief at 6 arguing that State "does not dispute that it failed to reveal its medicating of the defendant to the trial court or defense counsel.").

The most telling indication that Mr. Nitz was not forcibly medicated and in fact knew full well that he was being given the medication, is the fact that the jail records indicate that he "refused" the drug on the evenings of October 13, 19, 20, and from October 22 through 24, 1988. This fact alone removes any doubt as to whether Respondent's liberty interest in freedom from unwanted antipsychotic drugs was at stake here as it was in *Riggins*.

III.

RESPONDENT NITZ FALSELY REPRESENTS THAT NO OTHER CASE WOULD BE AFFECTED BY A GRANT OF CERTIORARI IN THIS CASE.

Perhaps the most flagrant misrepresentations in Respondent's brief in opposition are his contentions that only his case alone "would be affected by any action this Court

might take in this case," and that of the 71 cases listed by the State in Appendix C to its petition for certiorari,[4] only his raised a violation of the Due Process Clause. (Opposition, pp. 8-9). These assertions are blatantly false.

In addition to the 71[5] cases which have already resulted or could yet result in new trials or sentencing hearings

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[4] Nitz submits that 42 cases listed in the State's Appendix C to the petition for certiorari are on direct appeal status, not 35 as the State represents. (Opposition, p. 9 n. 8). In its survey, the State found that a few of the State's Attorneys reporting in classified any case in which the defendant had been convicted and sentenced as a "post-conviction" matter, although technically the matter was not pending under the Illinois Post-Conviction Hearing Act. For example, in *People v. William Horton,* a case out of Rock Island County, the defendant, upon pleading guilty, was convicted of first degree murder and sentenced. A post-trial motion to reconsider his sentence was filed but denied, and the matter was appealed. The Illinois Appellate Court remanded the case due to the failure of defense counsel to file a Rule 604(d) certificate which is required in Illinois when a defendant moves to withdraw a guilty plea. The 604(d) certificate was filed together with a new motion to reconsider the sentence. That motion was denied and the case was again appealed. The Illinois Appellate Court remanded a second time, finding the 604(d) certificate defective. Once back in the trial court, the defendant filed a third motion to reconsider his sentence and, while that motion was pending, filed an amended motion raising the psychotropic medication issue. That motion was granted and the defendant is now being retried.

[5] One case, *People v. Leonard Kidd*, No. 76490, 1196 LEXIS 132 at *8 (Ill. Sup. Ct. Dec. 19, 1996), has since been decided against the defendant. Applying the definition of psychotropic drugs found in the Mental Health and Developmental Disabilities Code (405 ILCS 5/1-100 through 6-107 (West 1994)), which defines the term psychotropic medication as a "medication whose use for antipsychotic, antidepresessant, antimanic, antianxiety, behavioral modification or behavioral management purposes is listed in AMA Drug Evaluations, latest edition, or Physician's Desk Reference, latest edition, or which are administered for any of these purposes," the Illinois Supreme Court found that the drug the defendant was receiving—Dilantin—was not a psychotropic drug.

under the majority of the Illinois Supreme Court's "automatic reversal" rule, the Illinois Attorney General has become aware of three more capital defendants who have filed post-conviction petitions raising colorable psychotropic medication claims—*People v. Mark Johnson*, No. 86 CR 205 (Circuit Ct. of Cook County); *People v. Tyrone Strickland*, No. 85-13416 (Circuit Ct. of Cook County); and *People v. Ronald Barrow*, No. 80332, (appeal to the Ill. Sup. Ct. from Circuit Ct. of LaSalle County). An excerpt from the brief of one of these defendants, Ronald Barrow, demonstrates that defendants are most certainly raising the psychotropic medication issue in the context of a violation of the Due Process Clause, given that raising merely a violation of a state statute is insufficient under the Illinois Post-Conviction Hearing Act. The excerpt also shows that defendants are indeed citing to the opinion below as authority to support their due process claims.

The State of Illinois further notes that the decisions of the majority of the Illinois high court speak for themselves with respect to the justices' perceived implication of the Due Process Clause in this line of cases. *See Kinkead*, 168 Ill. 2d at 414, 660 N.E.2d at 861 (case remanded to determine whether the drug was given proximate enough in time to the defendant's guilty plea to find that defense counsel's failure to request a fitness hearing and the court's failure to hold such hearing "had in fact denied defendant *due process of law*") (emphasis added); *Birdsall*, 172 Ill.2d at 476, 670 N.E.2d at 706 (holding that "[c]onsistent with *principles of due process*, if an accused who is entitled to a fitness hearing is not accorded such hearing before being criminally prosecuted or sentenced, the conviction ordinarily must be reversed . . . .") (emphasis added); and *Nitz*, (App. to Petition, p. 9), (holding that although defendant's right to a particular procedure is wholly statutory, "his

right to inquiry concerning fitness flows from the *due process guarantee*") (emphasis added).

The catastrophic effect from this line of cases will occur as a consequence of the majority finding a federal constitutional infringement resulting from the violation of a state statute, which can be raised by state prisoners on state collateral review and which cannot be waived due to its constitutional magnitude. *See Nitz* (App. to Petition, p. 10) (stating: "[f]urther, to the extent that the State is suggesting waiver, we reject it out of hand. As we have stated, the right not to be tried while unfit is highly valued. Not even the failure to timely assert a fitness issue will cause the right to fall prey to the ordinary operation of procedural default.") The state statutory provision in issue, § 104-21(a), was enacted in 1979. The provision was not amended until December, 1995, or December of 1996, depending on whether the constitutionality of the 1995 amendment is ultimately upheld on appeal.[6] *See* Petition at 11 n. 7. That leaves at

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[6] The majority has already held that the new amendment to § 104-21 does not apply to collateral matters. *See Nitz*, (App. at Petition, p. 11) (stating that "amendatory acts which are procedural in nature have retrospective operation for matters which are *pending* on the effective date of the amendment or are subsequently filed. (citations omitted). As this is a collateral matter, the amendment, though procedural in nature, does not apply.") (emphasis in original). This holding, however, is inconsistent with the majority's ultimate finding on the same issue in a case on direct review which was decided on June 20, 1996. In the slip opinion issued on that date, the majority noted that the State had filed the amended statute as additional authority. *People v. Birdsall*, No. 77259, slip op. at 9 n. 1 (Ill. Sup. Ct. June 20, 1996). It further noted, however, that the amendment did not become effective until December 13, 1996 and, accordingly the amendment did not apply to that case. *Id.* at 9-10. When the error in connection with the effective date of the amendment was called to the court's attention, a revised opinion was released with the date changed from "December 13, 1996" to "December 13, 1995." *Birdsall*, 172

(continued...)

risk the convictions or sentences of hundreds, if not thousands, of prisoners who were tried during those 16 or 17 years, to whom principles of waiver and statute of limitations rules will not be applied. The magnitude of cases alone could cripple the criminal justice system in Illinois.

CONCLUSION

As more fully set out in the petition for certiorari, Petitioner reiterates that Illinois has afforded and continues to afford criminal defendants constitutionally adequate procedures to demonstrate their incompetence to stand trial. *Drope*, 420 U.S. at 172. Specifically, a trial court must order a determination of a defendant's fitness to stand trial when a *bona fide* doubt of fitness is raised by the defense, the State or the court at any appropriate time before a plea is entered or before, during, or after trial. Ill. Rev. Stat. ch. 38, para. 104-11(a) (1987) (now codified as 725 Ill. Comp. Stat. 5/104-11(a)). Aside from a reasonable opportunity to demonstrate incompetence, no other particular state statutory provision dealing with the determination of fitness is mandated under the federal Constitution. In finding that a violation of § 104-21(a) results in an infringement of the Due Process Clause, the majority of the Illinois Supreme Court has seriously erred. To prevent any further unnecessary drain on the Illinois criminal justice system, this Court should issue a writ of certiorari.

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[6] (...continued)
Ill.2d at 475 n. 1, 670 N.E.2d at 706 n. 1. The rest of the footnote, however, remained unchanged resulting in a holding which is inconsistent with the majority's finding with respect to the same issue in the case at bar.

Respectfully submitted,

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App. 1

APPENDIX

No. 80332

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, IL
Plaintiff-Appellee,	)	
vs.	)	No. 84-CF-74
RONALD BARROW,	)	
Defendant-Appellant.	)	Hon. Robert H. Adcock, Judge Presiding.

BRIEF AND ARGUMENT
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ORAL ARGUMENT REQUESTED

IV. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND HIS STATUTORY RIGHTS WERE VIOLATED WHERE HE WAS ADMINISTERED A PSYCHOTROPIC DRUG ON A DAILY BASIS BEFORE AND DURING HIS TRIAL AND WHERE A FITNESS HEARING WAS NEVER CONDUCTED

Ronald Barrow was taking the drug **adapin** under medical direction, beginning on November 6, 1984 while he was in pre-trial incarceration and continuing virtually on a daily basis until at least June 10, 1985 [P.C. Exh. 124, P.C.C. 2930-2943]. The drug was administered at the LaSalle County Correctional Center in Ottawa. He had informed LaSalle County Medical Authorities of his previous treatment for a medical condition and his experience with "nervous problems," severe headaches, stomach or ulcer problems and the like [P.C. Exh. 123]. Mr. Barrow has a prior history of mental problems [P.C. Exh. 44, 45, 46, 47, 66; P.C.C. 1340-53]. His trial was held in late May and early June, 1985. During the trial, he was administered adapin every single day.

An Illinois statute, 725 ILCS 5/104-21, makes clear that a defendant who is receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication. This court has held that the administering of psychotropic medication equates to a **bona fide** doubt as to fitness to stand trial, thereby affecting the fair trial right. It held further that the trial judge does not have discretion on this matter and that the entitlement was of such constitutional magnitude that it could not be waived even where counsel could have raised the claim earlier but had not. *People v. Brandon*, 162 Ill. 2d 450, 643 N.E.2d 712, 715-16 (1994); *People v. Gevas*, 166 Ill. 2d 461, 469 (1995); *People v. Nitz*, 173 Ill. 2d 151, 161, 670 N.E.2d 672 (1996). The legislature must have intended, this Court held, that section 104-21(a) in-

clude medications capable of interfering with the ability to understand the nature and purpose of the proceedings against him or to assist in his defense. *People v. Kinkead*, 168 Ill. 2d at 407. "Psychotropic drugs are clearly capable of doing so." *People v. Britz*, No. 76618 (October 18, 1996).

Psychotropic medications are defined as those listed as such in the AMA Drug Evaluations or the Physician's Desk Reference (PDR), *People v. Britz*, at 14. As cited in Mr. Barrow's Supplemental Post-Conviction Petition [P.C.C. 2922-2927], adapin is listed in PDR as a psychotropic drug under the name sinequan. Both adapin and sinequan are brand names for the drug doxepin. The drug is a psychotherapeutic agent used for treatment of psychoneurotic patients with depression and/or anxiety. See Physicians' Desk Reference (1996 ed.), pp. 219, 2205.

A defendant taking psychotropic drugs is entitled, by statute, to a fitness hearing prior to trial, 725 ILCS 5/104-21(a). No such hearing was ever held in Mr. Barrow's case. The fact that his lawyer never requested such a hearing does not obviate the need for one nor does it mean that the hearing was waived. The lack of a specific request is only further evidence of the incompetence of counsel, argued elsewhere.

The failure of the State to notify the defense and the trial Court that it was medicating Mr. Barrow before, during, and after trial is a violation of the Sixth and Fourteenth Amendment rights, Sections 2 and 8 of the Illinois constitution,[*] and the Illinois statute. The remedy for this violation is a new trial. *Brandon*, 162 Ill. 2d 450.

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[*] Although this defendant cites to the Illinois Constitution as well as the Fourteenth Amendment of the federal Constitution, as the State of Illinois noted in the petition for certiorari, the majority of the Illinois Supreme Court relied exclusively on the Due Process Clause of the Fourteenth Amendment and at no time in any of its decisions referred to the Illinois Constitution.